Supreme Court, U. S.
FILED
MAR 17 1979
DAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1447

RODNEY J. STRAIN, ET AL.,
Petitioners

versus

KENNETH TURNER, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

In Re: Liquid Carbonic Truck Drivers Chemical Poisoning Litigation M.D.L. No. 252

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

Charles J. Strain, Jr., Leonard Strain, Rodney Strain, Carl Martin, and Dennis Morris, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 22, 1978 and to the judgment danying rehearing entered on December 18, 1978.

OPINIONS BELOW

The opinion of the Fifth Circuit on petitioners request for rehearing is unreported and is printed as Appendix A hereto, infra, page A - 1 . The judgment of the Fifth Circuit on petitioners appeal is unreported and printed in Appendix B hereto, infra, page A - 5 . The Journal Entry of judgment of the United States District Court for the District of Louisiana is printed in Appendix C hereto, page A - 16.

JURISDICTION

The judgment of the Fifth Circuit (Appendix B, infra, page A - 5) was entered on September 22, 1978. A timely petition for rehearing was denied on December 18, 1978 (Appendix A, infra, page A - 3). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) This case squarely presents the question whether the entirety of a complex multi-district litigation plaintiffs' case can be dismissed for filing one day late answers to interrogatories propounded by one of many defendants without an evidenciary hearing to determine whether plaintiffs' failure "materially" affected the substantial rights of *all* the adverse parties and was "prejudicial" to the prosecution of said parties' case.

(2) This case squarely presents the question whether the entirety of a complex multi-district litigation plaintiffs' case can be dismissed as to all adverse parties for the general misbehavior of plaintiffs' attorney, or in the alternative, even plaintiffs themselves (which is now and has always been denied) on an ex parte motion of defendants.

(3) This case squarely presents the question of whether plaintiffs' constitutional rights of due process have been abrogated by abuse of discretion by the trial court in dismissing plaintiffs' case.

CONSTITUTIONAL AMENDMENT AND CODE OF CIVIL PROCEDURE RULE INVOLVED

This matter concerns the first section of the 14th Amendment of the United States Constitution and Federal Rule of Civil Procedure Rule 37(d) and 37 (b) (2) (c) which provides respectively as follows:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of the equal protection of the law.

2. Rule 37(d) provides in part:

> "(d) Failure of a Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.
>
> If a party or an officer, director, or managing agent of a party of a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response

to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take an action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . ."

3. Rule 37 (b) (2) (C) provides in part:

"(b) Failure to Comply with Order.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(c) An order striking out pleadings or parts thereof, or staying further proceedings under the order is obeyed, or dismissing the action or proceedor any part thereof, or rendering a judgment by default against the disobedient party;"

STATEMENT OF THE CASE

This is a case arising under 28 U.S.C. 1331, 1332, and 1337. Appellants herein were truck drivers employed by Liquid Carbonic Corporation and claim, and if given the chance will prove, they suffered chemical poisoning which resulted in their complete disablement. Appellants filed a civil suit in the United States District Court against various companies and the so-called executive officers of the employer corporation, against their medical insurer Aetna Casualty and Surety Company, and for Workmen's Compensation in the state court. It was clear in limine they were injured either on the job or off the job with the Workmen's Compensation insurer liable in the first instance and their medical insurer in the latter for the many many thousands of dollars of medical expenses. Appellants were represented by attorney Louis Koerner who in the state court failed to prove by a preponderance of the evidence their injuries were incurred in the course and scope of their employment. Attorney Koerner did not perfect an appeal of that decision. Accordingly, appellants should have been able to prevail for their gargantuan medical expenses from their medical insurer; however, their suit for such expenses was consolidated with appellants suits against the various companies and executive officers as noted before. The costs expended by appellants is estimated at between Thirty-Five Thousand ($35,000.00) and Forty Thousand ($40,000.00) Dollars.

On or about May, 1977, appellants Rodney and Charles Strain had gone to attorney Koerner's office and were told he, Koerner, was "broke" and "couldn't fight anymore". Koerner then lead the pair into his law partner's office who then berated and scolded appellant Charles Strain with res-

pect to a case totally uninvolved to that had and then told him "they couldn't win" the case herein despite repeated prior assurances there was no way to loose their medical expenses. The pair requested Koerner retain added counsel to assist on the case and to share in the over-all financial burden but Koerner refused. After informing the other appellants herein of Koerner's actions and representation and fearing less than zealous prosecution of their case, appellants attempted to retain other counsel but Koerner motioned appellants into court on May 25, 1977, approximately two weeks prior to the scheduled pre-trial conference. *The court* at that hearing *would not allow* appellants to change attornies after eliciting from the new attorney after questioning in the case that he probably could not adequately prepare for the pre-trial set within two weeks. Appellants were then placed unwillingly back into Koerner's hands who did not call appellants until approximately July 2 or 3, 1977, with respect to answering various interrogatories although there had been an outstanding court order of June 15, 1977, requiring answering of interrogatories. Appellants immediately went to Koerner's office and answered all questions presented to the best of their ability. On July 5, 1977, Koerner filed the answers to interrogatories of appellants and the other non-dismissed plaintiffs on July 5, 1977. Appellants will show, if *ever given an evidentiary hearing*, that it was them who personally answered the interrogatories while the answers with respect to the *non-dismissed plaintiffs* were answered by Koerner personally *without their knowledge or assistance.*

For the two weeks preceding the trial from 8:00 A.M. to approximately 9:00 P.M. each day, appellants and their wives went to Koerner's office at his behest and helped him

organize papers, xerox documents, and do any other job to assist him. Koerner later told appellants they need come to a hearing on August 17, 1977, although the reason for said hearing was not explained. Appellants later discovered at the hearing of August 10, 1977, the district court judge had ordered Koerner to file the answers to various interrogatories by 5:00 P.M. on August 15, 1977, although attorney Koerner informed the court five days was inadequate. (Transcript, August 10, 1977, pg. 52) Koerner was further ordered to deliver the pre-trial order by 5:00 P.M. August 15, 1977, which order consisted of seventy-eight (78) pages in length.

Attorney Koerner filed the third set of interrogatories with regard to a case involving fifty (50) volumes with three supplements and thousands of pages of discovery transcripts accumulated over a three (3) year period on August 16 or 17.

Appellees "Ex-parte Motion to Dismiss" was filed on and served on August 17, 1977. At the hearing of August 17, 1977, attorney Koerner admitted "Its [sic] my fault. Don't impute it [the problems associated with answering the interrogatories] to them. Sanction me". (Transcript, August 17, 1977, pg. 37) Koerner then stated "five of the nine" were not fully cooperative with him and stated it was "the five people who bolted", i.e. the appellants herein who tried to salvage their case by obtaining other counsel.

Koerner filed a motion for re-instatement and a hearing was set on August 24, 1977, which resulted in a denial of the motion. All the remaining plaintiffs subsequently compromised their claims.

REASONS FOR GRANTING WRIT

The District Court in its reasons for Judgment stated appellant's case was "dismissed for failure to comply with [his] order of August 10, 1977, that full and good faith answers to interrogatories be filed by 5:00 P.M. on August 15, 1977." The Court then stated that because of the past history of disobedience and lack of cooperation by the appellants *"and by Mr. Koerner himself"* dismissal was appropriate. The Court then went on to list multiple alleged acts the Court considered in ordering the dismissal. There is *no evidence* to document any disobedience, willful or otherwise, or bad faith in *appellants themselves* and it is clear the District Court was annoyed and angered by the attorney Koerner. In *Societe International v. Rogers*, 357 U.S. 197, 78 S.C. 1087, 2 L. Ed. 2d 1255, (1958) the S.C. in explaining Rule 37, stated that said rule

> "should not be constructed to authorize dismisal of [a] complaint because of petitioner's noncompliance with a pre-trial [discovery] order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

Further, as made clear in *Wilson v. Volkswagen of America, Inc.*, 561 F. 2d 494 (4th Cir. 1977) the trial court's

> "range of discretion is more narrow in entering a default Judgment than when the Court is imposing other less severe sanctions cause, though 'a rational method of enforcement of the discovery rules,' represents in effect 'an infringement upon a

> party's right to trial by jury under the seventh amendment' and runs counter to 'sound public policy of deciding cases on their merits,' and against depriving a party of his 'fair day in Court'."

A leading text has stated the exercise of the power should be confined to the "flagrant case" in which it is *demonstrated* that the failure to produce *"materially* affect(s) the substantial rights of the adverse party" and *"is prejudicial to the prosecution* of the case." (our emphasis). 8 Wright & Miller, Fed. Practice & Procedure, § 2284, pp. 776-772. The issue of materiality is always open to appeal. 8 Wright & Miller, Fed. Practice & Procedure, § 2289, p. 791. In said text, it is further stated: "If sanctions are imposed under Rule 37(b), however, on appeal from the order imposing sanctions, the appellate court will consider the propriety of the prior order for discovery." See also *Wilson v. Volkswagen of America, Inc.*, supra. In *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970), 860-1, the Fifth Circuit stated:

> "The rule is designed to empower the Court to compel production of evidence by the imposition of *reasonable sanctions.* The Court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment of *general misbehavior."* (our emphasis)

Further, in *Robison v. Transamerica Insurance Co.*, 368 F. 2d 37, (10th Cir. 1966), p. 39, the Court stated: "* * * The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties." See also *Linnear v.*

White, 422 F. 2d 864, (7th Cir. 1970). In *Diaz v. So. Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970), this Court again stated the normal rule is that the proper sanction "must be no more severe * * * than is necessary to prevent injustice to the movant." In *Flaks v. Koegel*, 504 F.2d 702 (2nd Cir. 1974), the Second Circuit held the trial court abused its discretion in striking defendant's answers and directing entry of a default judgment because of defendant's failure to respond to interrogatories and to appear for deposition for *failure of the lower court to conduct an evidentiary hearing in order to determine defendant's willfulness.*

Lastly, in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 49 L.Ed. 2d 747, 96 S. Ct. 2778 (1976), the S.C. made it clear the District Court was required to consider the *full record* in determining the appropriateness of its decision, and the record *must support* that finding. In determining whether to impose such a sanction of dismissal, the needs of the discovery party must be evaluated as well as the nature of the non-compliance, and the Trial Court *must consider* "how the absence of such evidence [not produced] would impair [the other party's] ability to establish their case," and whether the non-complying party's "conduct [in not producing documents] would deprive [the other party] of a fair trial." See also, *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975); *Wilson v. Volkswagen of America, Inc.*, supra. In *Von Der Heydt v. Rogers*, 102 U.S. App. D.C. 114, 251 F.2d 17 (1958), the Court said that the District Court had taken extensive evidence on the "materiality of the records sought, the possession and control of these records by appellant * * * [but] made no findings other than its order of dismissal which it characterized as containing findings." The Court of Appeal reversed,

saying:

> " * * *The burden of showing materiality of the information and ability to produce it rests on the one seeking discovery. At a point the burden of going forward with the evidence may shift to the party asserted to be in possession or control. Absent specific findings to be reviewed in the light of the evidence, we cannot make an adequate assessment of this issue.* * *"

In Re: *Professional Hockey Antitrust Litigation*, 63 F.R.D. 641 , rev'd (E.D. Pa. 1974) 531 F.2d 1188, (3 Cir. 1976) rev'd 427 U.S. 639, 96 S. Ct. 2778, 49 L.Ed. 2nd 747 (1976), the procedure to be followed was illustrated by the Trial Court, in accordance with the following principles in exercising the power to grant the sanction of a default judgment. The Trial Court found that the interrogatories to the plaintiff and left unanswered were "crucial interrogatories" which went to the heart of the discovery party's defense and were thus clearly material; that the plaintiff admitted on a number of occasions that he had available to him the information required for the interrogatories; that the plaintiff had been given at least *five* extensions, some made out of time and granted with warnings of possible sanctions, for answering the interrogatories, always on representation, never honored, that, if granted, answers would be duly filed; that these delays had forced at least *three* postponements of a trial date; and that any lesser sanction, such as denial of right in plaintiff to prove the matters not responded to by it, was not a reasonable alternative to default judgment, since the practical effect of denial of right to prove the material by the plaintiff would be to make impera-

tive judgment in favor of the defendants. The Trial Court carefully evaluated "the needs of the discovering party," considered the effect of non-compliance on the "ability [of the defendants] to establish their case" and concluded that no remedy other than default judgment would "prevent prejudice to the movant." The findings above were fully detailed in the Trial Court's order and found to clearly support the default judgment "by reason of [plaintiff's] 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities."

This reviewing court is obligated "to consider the full record" as well as the reasons assigned by the Trial Court for its Judgment, and to reverse the Judgment below if after such review this appellate court " 'has a definite and firm conviction that the court below committed a clear error of Judgment in the conclusion it reached upon a weighing of the relevant factors.' " *Wilson v. Wolkswagen of American, Inc.*, supra; *Finley v. Parvin-Dohrmann Co., Inc.*, 520 F. 2d 386 (2d Cir. 1975); *Anderson v. Air West, Inc.*, 542 F. 2d 522 (9th Cir. 1976); *U.S. v. Leggett & Platt, Inc.*, 542 F. 2d 655 (6th Cir. 1976).

The Trial Court herein dismissed appellants' case and their future and deprived them forever of their constitutionally protected right to trial by jury on the basis of attorney Koerner filing his third set of answers to defendant's interrogatories "on August 16 or 17" instead of "August 15 at 5:00 P.M." To be noted is that this case is not one of failing to answer since attorney Koerner filed amended answers to the interrogatories in question three times. Further, there was *no determination* whether the last set would have been sufficient in the eyes of Judge Sears. On August 31, 1977,

at p. 52, the Trial Court's only objection was that the three sets of interrogatories had not conformed to "the preference" of Magistrate Hughes. *There is nothing in the record* to indicate Magistrate Hughes had, prior to Koerner's filing the interrogatories, required this. At the hearing, Koerner agreed to consolidate the answers if so required. There was *no hearing* to determine the *materiality* of the interrogatories *or any prejudice* to defendant's of either the allegedly incomplete answers *or* of the *one day late* filing of same. Again, the only objection voiced at the August 31, 1977, hearing was Magistrate Hughes's preference. There was *no finding* in the Trial Court's reasons of *materiality or prejudice*. There was no *hearing on willfulness* or bad faith in filing the answers one day late, and at the August 31, 1977, hearing, the Trial Court did not wish testimony of appellants as to their good faith. Further, how could it be said that several hundreds of pages of answers to interrogatories reflected *anything but* good faith. There was *no hearing or reasons* assessing *alternative sanctions* as mandated by law such as contempt of Koerner or not allowing evidence on any interrogatories in which the one day delay could have been found to have been prejudicial. There was *no consideration* that appellants had tried to relieve their attorney for fear of his being tardy in his duties but was told by the Trial Court in the May 25, 1977 hearing he was reluctant to release Koerner "for fear that counsel will not be prepared to proceed with the motions for summary judgment and with the trial on August 29." Further, at p. 25 of the transcript of said hearing, Judge Sears told Koerner "he was still the attorney of record and [he] must continue to represent and [prepare] for the case." Therefore, the Trial Court in the face of what it now considers numerous indiscretions by attorney Koerner had appellants retain their relationship with

him and then dismiss their case for the same tardiness which he was cognizant on the May 25 hearing. There *was no evidence* of bad faith or otherwise by appellants personally; appellants have numerous phone lists to show the number of times koerner was called without response. Further, the Trial Court at the hearing of August 31, 1977, heard attorney Edward Rice state his fears of appellants, but then would not have Mr. Rice be sworn or allow appellants to testify. Appellants contend it is pure fabrication of any threats from them, and the only occasion of anger was in Koerner's office in the day mentioned heretofore. As to whether appellants are angry, they ask the Court to put themselves into their shoes.

Further, for what reasons did the Trial Court dismiss appellants and not the other four plaintiffs? It is patently unfair since in truth and in fact they were the only ones who answered their interrogatories. Again, on information, plaintiffs Roger Moran and Marvin Brown, still in the lawsuit, never answered their interrogatories but attorney Koerner answered same for them.

Appellants further contend items listed by the Trial Court for its annoyance such as Koerner fighting on an equity argument retention of United States Steel, Koerner's failure to add U.S. Steel and Transition before the multidistrict transfer and Koerner's filing a third amended complaint without leave of Court could hardly lead to a conclusion that in a complex multilitigation case such as this one attorney Koerner or appellants were in bad faith or that the resultant one day delay in filing the interrogatories was in bad faith. Further, on pg. 22 of the August 31, 1977 hearing the Trial Court said Koerner was not in bad faith although in its reasons for Judgment

points to *Koerner's legal* actions as pointing to appellants bad faith. It does not follow! At pg. 21, attorney Rice admits there had not been "any admission or discussion of good or bad faith."

If an evidentiary hearing had been taken, it is believed attorney Koerner would have referred, based on his motion for reconsideration of motions to intervene or participate as amicus curiae to his "Motion and Order to Withdraw Motion to File Third Amended Complaint as Improvidently Filed" signed on January 25, 1977 by Judge Sear and filed January 26, 1977. Ground one states:

> "By motion and proposed order, plaintiffs endeavored to have the Third Amended Complaints filed ex parte, however, by order of this Honorable Court, the matter was referred to Magistrate Kenneth Hughes, and was granted by Magistrate Hughes without opposition from defendants in this matter."

Accordingly, despite the requirement of considering the entire record, no mention is made of Magistrate Hughes' order allowing the amended complaint. Attorney Koerner suggests the text of the district court's Minute Entry of August 22, filed August 24, 1977, [Original Record, Volume 27, pp. 1903-1910] would indicate that there had been no action by a Court official authorizing the filing of the Amended Complaint when such implication is contrary to the facts contained in the record.

Also, the Trial Court lists as bad faith attorney Koerner's obtaining "an informal extension from Process Engineering's

attorney until July 5th" to file the interrogatories. Why, if defendant Process Engineering did not complain, would the Court become so annoyed? *Obviously*, there was no prejudice to defendant Process Engineering since they consented to the delay. At pg. 4 of its reasons, the Trial Court states: "it was determined that Koerner would submit new answers" to correct alleged deficiencies. Again, does such show bad faith? Is it unusual for defendants to use every weapon in their arsenal to defeat plaintiff's claims and object to sufficiency. Certainly not!

Again, it is believed attorney Koerner would have cited the case of *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 291-92 at fn. 20, 88 S. Ct. 1575, 1594, 20 L. Ed. 2d 569 (1968), rehearing denied 393 U.S. 901 (1969), wherein a six year lapse occurred between filing of the complaint and completion of examination of petitioner and wherein both parties had entered into numerous stipulations postponing taking of depositions for months at a time. This Honorable Court stated: "Petitioner argues he cannot be penalized for not working full time at supplying the defendants with deposition testimony. This is certainly correct. However, petitioner cannot, by the same token, attempt to penalize respondent for delays in which he acquiesced with no hint of objection."

With respect to the August 2, 1977, hearing on marshalling of exhibits, the Trial Court again does not even mention or explore the reason for the "emergency" that called attorney Koerner away. Obviously, Koerner's associate had considerable trouble with the exhibits and the Trial Court's despair can be felt, but once again, if after a determination that Koerner's absence was unexcused, other sanctions as

contempt would be available. How can the Trial Court persistently point to legal actions of Koerner as indicative of appellant's willfulness or bad faith.

Again, if an evidentiary hearing had been taken, it is believed attorney Koerner would have sought to justify the fact his exhibits were in "disarray" by contrasting the shear volume of 600 plaintiffs' exhibits with 29 of appellees.

At pg. 5 of the Trial Court's reasons, the Trial Court notes it demanded further answering of the interrogatories or dismissal despite Magistrate Hughes' recommendation "the case be continued".

Again, if an evidentiary hearing had been taken, it is believed attorney Koerner would have referred to the conference between the Honorable Judge Morey Sear, Magistrate Hughes, and the attorneys held on July 20, 1977, at which he ordered Magistrate Hughes to "carefully review" new answers to interrogatories. It is believed attorney Koerner would have noted no consideration was given to the fact that Magistrate Hughes failed to give any specific criticisms to any of the answers filed until the August 31 hearing. At page 33 of that hearing, Magistrate Hughes admits that the answers and supplements basically answered the questions. [Original Record, 1st Sup. Record]. Further, it is believed for the reasons stated heretofore, Koerner would have noted the Minute Entry in support of dismissal implied that none of the appellees found any of the appellants' answers sufficient at any time whereas by letter of July 20, 1977, from Mr. Jerry Saparito, attorney for one of the appellees, to Koerner states that only certain answers were deemed insufficient implying, therefore, the vast majority to have been sufficient.

On pg. 7 of the Court's reasons, the Trial Court labels the tardiness of one day as "willful" again without any hearing or determination of prejudice or the facts surrounding the delays. This case, again is forty volumes with three supplements spanning *thousands* of pages and, just to review all the records is a gargantuan task in itself. Are not delays expected! It has taken appellants many years to reach the trial stage–are they for the sake of one day and various petty annoyances to be forever barred from recovery of the most debilitating and agonizing disability imagined.

Further, with respect to the one or two day delay in filing answers to interrogatories cited in the August 22nd Minute Entry, it is believed attorney Koerner would have referred to the facts that the District Court was informed at the August 10, 1977 hearing five days was inadequate; that the August 10, 1977, settlement interfered with completing the new answers; that preparing 78 page pretrial order, also due August 15th, interfered with completing the new answers. Further, reference would have been made to *Meurer-Neuer, Inc. v. United Packinghouse Workers of America*, 26 FRD 139, 140 (D. Kan. 1960) and *David v. Hooker*, 560 F. 2d 412, 420 (9th Cir. 1977) for the proposition that preoccupation with another aspect of the same case is not grounds for dismissal for failure to answer the moving parties interrogatories. As attorney Koerner also notes in his previously noted motion at the August 17, 1977, hearing, the Honorable Judge Morey Sear stated that had appellants filed a motion for extension of time to answer the interrogatories, he might have been less severe. However, the Court is referenced to the "Order of Reference to U.S. Magistrate" on Motion for sixty day extension, signed by Judge Sear on January 31, 1977. Koerner would, it is believed, have suggested that the import of the Order is that by the time it expired, appellants apparently thought they were represented by new counsel, which resulted in an order by Judge Sear staying action on all pending motions until counsel was determined. By the time the issue was resolved, it was already June and just before the first hearing on discovery, on June 15th, which was held before Magistrate Hughes.

There had been no, nor can there be, proof of plaintiffs' lack of cooperation with their attorney. Why should they at home disabled want to do *anything but* assist their attorney. It begs the question to imagine otherwise. In any event, the Trial Court again without an evidentiary hearing, concludes appellants have contributed to the failure to answer but not to the other plaintiffs. Over and over again, the Trial Court has made statements that are simply unsubstantiated and without hearing the testimony of appellants themselves. Is it possible for so huge a punishment to fit the one day delay without a showing of prejudice and with an admission the interrogatories were answered but not in an order of "preference" of the Magistrate? Further, appellants were dismissed upon an ex parte motion which was not filed nor served on appellants' attorney until the day of the August 17, 1977 hearing. Appellants contend granting an ex parte motion to dismiss without any form of notice, especially when the mover has never filed a motion to compel, constitutes an abuse of discretion. *Alexander v. Brown*, 26 U.S. (1 Pet.) 683, 7 L. Ed. 314 (1828). Local Rule 3.2, which governs setting motions for hearing, requires "at least ten days actual notice".

With respect to Issue No. 3, because the trial court did not hold an evidenciary hearing to determine materiality and

prejudice; because the trial court violated Local Rule 3.2; because the trial court dismissed plaintiffs' suits against all defendants, although the answers to the discovery, which was one day late, was only with respect to one defendant; because the trial court only cited in the record "the general behavior of plaintiffs' attorney"; and finally, because other less harsh sanctions were readily available, such as contempt, penalties, or dismissal as to the one defendant who suffered the one day tardiness in receiving answers to their interrogatories, appellants firmly believe that they have been denied their constitutional rights to due process to be afforded the opportunity for a hearing on the merits of their case. *Affanato v. Merrill Bros.*, 547 F. 2d 138 (1st Cir. 1977); *Thomas v. United States*, 531 F. 2d 746 (5th Cir. 1976); *Societe International Pour Participations Industrielle Et Commerciales v. Rogers*, supra.

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD S. SMITH
P. O. Box 1474
Covington, Louisiana 70433
(504) 892-5144

PROOF OF SERVICE - AFFIDAVIT

I, Bernard S. Smith, attorney of record for Charles J. Strain, Jr., Leonard Strain, Rodney Strain, Carl Martin and Dennis Morris, appellants herein, depose and say that on the day of March, 1979, I served a copy of the motion for extension of time to file petition for writ of certiorari on appellees herein by depositing such copies in the United States Post Office with first class postage prepaid, properly addressed to the post office address of Edward J. Rice, counsel of record of appellees Kenneth Turner, J. C. Heilgiest, J. H. Trautwein, J. F. Wakolbinger, Sam J. Testa, W. H. Crescenti, W. C. Witte, W. Goken, John F. Exposito, John Ziebell, Aland Corp., and Aetna Casualty and Surety Corp., at 4500 One Shell Square, New Orleans, Louisiana, 70139, and Jerry Suporito, counsel of record of appellees, Process Engineering, Inc., at P. O. Box C, 1615 Metairie Road, Metairie, Louisiana 70005.

All parties required to be served have been served. Dated March , 1979.

BERNARD S. SMITH
Attorney for Appellants
Post Office Box 1474
Covington, Louisiana 70433
Tel: (504) 892-9144

SUBSCRIBED AND SWORN TO BEFORE ME THE UNDERSIGNED NOTARY AT COVINGTON, LOUISIANA, THIS DAY OF MARCH, 1979.

_____

NOTARY PUBLIC

APPENDIX A

OPINION OF COURT OF APPEALS ON PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk
September 22, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 77-3056 - IN RE: LIQUID CARBONIC TRUCK DRIVERS CHEMICAL POISONING LITIGATION, M. D. L. DOCKET 252: MORAN v. TURNER

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will*

not suffice.

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/ Doria Call
Deputy Clerk

enc.
cc: Mr. Bernard S. Smith
Messrs. Edward Rice, Jr.
Lloyd Hayes
Mr. Jerry L. Saporito

DENIAL OF PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk
December 18, 1978

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-3056 - IN RE: LIQUID CARBONIC TRUCK DRIVERS CHEMICAL POISONING LITIGATION M.D.S. DOCKET # 252
STRAIN, ET, MORAN, ET AL v. TURNER ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/ Sally Hayward
Deputy Clerk

cc: Mr. Bernard S. Smith
Mr. Edward Rice, Jr.
Mr. Jerry L. Saporito

APPENDIX B

OPINION OF COURT OF APPEALS ON PETITION FOR REHEARING

In re LIQUID CARBONIC TRUCK DRIVERS CHEMICAL POISONING LITIGATION M.D.L. DOCKET NO. 252.

Rodney J. STRAIN et al.,
Plaintiffs-Appellants

Roger Moran et al., Plaintiffs,

v.

Kenneth TURNER et al.,
Defendants-Appellees.

No. 77-3056

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 22, 1978.

Personal injury suits were dismissed as to certain plaintiffs and as against certain defendants by the United States District Court for the Eastern District of Louisiana at New Orleans, Morey L. Sear, J., under the rule providing for dis-

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part 1.

missal of a party's claims for failure to obey discovery orders of the court. Such plaintiffs appealed. The Court of Appeals, Coleman, Circuit Judge, held that the District Court did not abuse its discretion in dismissing in view of a record showing that, for a protracted period of time, and even up until ten days before trial, such plaintiffs refused to respond to discovery orders, seriously prejudicing defendants in preparation of their case, showing callous disregard of court orders by such plaintiffs, including failure to transcribe depositions, failure to submit to court-ordered medical examinations, repeated failure to file timely and complete answers to interrogatories and failure to file witness lists, and in view of district court's excellent position to scrutinize and evaluate attitudes of such plaintiffs toward their attorney and the court.

Affirmed.

1. Federal Civil Procedure 1278

Court's power to order dismissal of party's claims for failure to obey discovery orders of court should be exercised only in exceptional circumstances, but limitation on use of sanction applies to protect those who, through no fault of their own, are unable to comply with court orders, and does not protect willful or bad-faith noncompliance with court orders. Fed. Rules Civ. Proc. rule 37, 28 U.S.C.A.

2. Federal Civil Procedure 1451, 1537, 1663

Federal district court did not abuse discretion in dismissing case as to certain plaintiffs in view of record showing

that, for protracted period of time, and even up until ten days before trial, such plaintiffs refused to respond to discovery orders, seriously prejudicing defendants in preparation of case, showing callous disregard of court orders by such plaintiffs, including failure to transcribe depositions, failure to submit to court-ordered medical examinations, repeated failure to file timely and complete answers to interrogatories and failure to file witness lists, and in view of district court's excellent position to scrutinize and evaluate attitudes of such plaintiffs toward their attorney and the court. Fed.Rules Civ. Proc. rule 37, 28 U.S.C.A.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

COLEMAN, Circuit Judge.

The appellants appeal an order by the district court dismissing their cases from a consolidated multi-party tort suit. They fervently argue that the district judge abused his discretion in ordering their cases dismissed on the basis of a single failure of their counsel to file answers to defendants/appellees' interrogatories on time. After a review of the briefs and the record, we find that there was much more leading to the dismissal than this single episode and that the district court's action cannot be characterized as an abuse of discretion. Therefore, we affirm the order of the lower court.

To appreciate fully the patience, and fortitude of the dis-

trict judge in dealing with appellants, a brief review of the background of the case is necessary. The five appellants were previously employed as truck drivers for Liquid Carbonic Corporation. Claiming injuries from chemical poisoning sustained during loading, unloading, and delivery of carbon monoxide to various chemical companies, the five appellants and eight other drivers filed two sets of lawsuits late in 1974. In one set of complaints, appellants sued ten individual officers and employees of Liquid Carbonic Corporation and Aetna Casualty and Surety Company (the insurer of Liquid Carbonic). Additional defendants included corporate owners of the tractor trailers, the manufacturer of the tractor trailers (Process Engineering, Inc.), and several chemical companies where appellants made deliveries. In a second set of complaints, appellants sued Liquid Carbonic and Aetna for alleged breach of an oral employment contract and for hospital and medical expenses.

Since several of the complaints were filed in other districts, the matters were brought before the multi-district litigation panel in Washington, D.C., and all were consolidated, at least for pre-trial proceedings, in the Eastern District of Louisiana. Pursuant to the rules and guidelines set forth in the Manual for Complex Litigation, in December, 1976, the court entered a Practice and Procedure Order giving schedules and deadlines for handling various phases of the discovery and pre-trial proceedings.

All plaintiffs settled with the chemical company defendants in the spring and summer of 1977. This left the thirteen plaintiffs aligned against the Liquid Carbonic interests and Process Engineering. Thereafter, Liquid Carbonic and Process Engineering settled with the four plaintiffs not

represented by Louis Koerner, attorney for the nine remaining plaintiffs, including the five appellants.

On August 17, 1977, after continued and consistent failure on the part of the five appellants to follow court orders, the district court dismissed their law suits. The other four Koerner plaintiffs were not dismissed because the Judge felt they had at least tried to comply with the court orders and to cooperate with their attorney. On August 24, 1977, the district court denied appellants' motion for reinstatement. Appellants filed this appeal *pro se* in April, 1978, apparently having fired Koerner and having failed to hire a new attorney.

The dismissal of appellants' cases was not a sudden occurrence, nor was it brought about by one specific act, or more correctly, failure to act. In truth, the District Judge bent over backward in dealing with appellants, extending numerous deadlines and giving one reprieve after another.

At a January 12, 1977, conference the Judge ordered that certain depositions, which had been taken several months before, be transcribed by January 31, 1977. This was never done by appellants. In early May both Liquid Carbonic and Process Engineering filed motions to dismiss because of appellants' failure to comply with numerous discovery orders. These motions were set for hearing on June 15, 1977, before United States Magistrate Kenneth Hughes. In the meantime the five appellants attempted to discharge their attorney, Koerner, and to find new counsel. At a conference with the Court on this matter, the appellants were told that they could retain new counsel if they wished, but any counsel brought into the case would have to be ready for trial as set on August 29, 1977. After some investigation, it developed

that appellants could not find an attorney who was either willing to shoulder the financial burden involved in the case or prepare the case in time for the trial. At this point appellants seemingly resigned themselves to representation by Koerner.

On June 15 Magistrate Hughes heard appellees' motion to dismiss based on failures of Koerner's plaintiffs to answer interrogatories and failure of two of Koerner's plaintiffs to submit to court-ordered medical examinations. The magistrate ordered that these two failures be cured by July 1 or the cases would be dismissed. On July 1 Koerner arranged with opposing counsel for an informal extension of the deadline to July 5. He did file the answers on July 5; however, he gave them to the appellees only on July 11. On July 14 the magistrate submitted a follow-up report to the Judge recommending dismissal of the cases for failure to comply with his orders on time.

Since the appellees found the answers to the interrogatories vague and incomplete, another conference with the magistrate was held on July 20 to discuss the problem. The conference was removed to the Judge's chambers where it was determined that Koerner would submit new answers for review by Magistrate Hughes.

On August 3 in accordance with earlier orders, all exhibits in the case were to be brought to chambers for examination by opposing counsel. Counsel for appellees arrived that day with all exhibits neatly ordered and labeled as had been stipulated. Koerner, however, had left town the day before on an emergency and had apparently forgotten the marshalling order. His associate, who knew virtually nothing about the

case, valiantly attempted to assemble some sort of presentation of Koerner's exhibits. The results of his labors were confusing at best and included a large box full of close to a thousand sheets of miscellaneous unrelated papers marked as a single exhibit and a set of personal photographs totally unrelated to the case.

Meanwhile, the magistrate had reviewed Koerner's latest set of answers and found "no substantial improvement over the original answers". On August 5 he recommended that the case be continued, because he believed the defendants should not be compelled to go to trial on August 29 without further discovery.

Another hearing before the Court was called on August 10 to consider the July 14 recommendation of the magistrate that Koerner's plaintiffs' cases be dismissed. Again, appellants were given a reprieve and an extension. The Judge said that Koerner had until 5:00 p.m. on August 15 to submit satisfactory answers to the interrogatories; if not, the case would be dismissed.

The pre-trial conference was set for 9:00 a.m. on August 15. Koerner called in after nine o'clock to explain that he was running late because he was xeroxing the pre-trial order. When he finally did arrive, no agreement on the pre-trial order could be reached. Therefore, all counsel were instructed to appear before the Judge on August 17 at 10:00 a.m. with an agreeable pre-trial order and to be prepared for a discussion of a possible continuance or dismissal of the case.

At 5:15 on August 15 counsel for the defendants telephoned the Judge to let him know that Koerner had not

supplied revised answers to the interrogatories. Apparently, the new answers were supplied on August 16th or 17th. This dilatory inaction was the last straw. At the August 17 hearing Judge Sear ruled that the cases of the five appellants be dismissed because of their repeated willful disregard of his orders. With his order the judge included a lengthy and detailed recapitulation of the most obvious instances of misconduct in the case in order to preserve for the record his reasons for dismissal.

Throughout all these proceedings and hearings Koerner explained that his difficulties in compliance with the court orders were caused by the five appellants' refusal to cooperate with him. Contrary to appellants' contention that "[t]here is *no evidence* to document any disobedience, willful or otherwise, or bad faith in *appellants* themselves . . ." (their emphasis), Koerner told the court that they contributed to the failure to answer interrogatories by refusing to speak to him or to answer his telephone calls over a period of several months while the interrogatories were outstanding. He indicated that the other four plaintiffs were cooperating with him. And in spite of all the problems which were aggravated by these five appellants' recalcitrance, Koerner made a good faith effort to protect their interests at the dismissal hearing on August 17.

We find, as other courts have found in similar cases, that additional evidence of the willfulness of appellants' disobedience is "mirrored in the record". *See DiGregorio v. First Rediscount Corporation*, 3 Cir. 1974, 506 F.2d 781, 788; *Diaz v. Southern Drilling Corporation*, 5 Cir. 1970, 427 F. 2d 1118, 1126, *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115; *Affanato v. Merrill Bros.*, 1 Cir. 1977, 547 F.2d

138. It is important to note, also, that prior to dismissal Judge Sear had met appellants on several occasions, and therefore, was in an excellent position to scrutinize and evaluate their attitudes toward their attorney and the court. Appellants were present at many of the hearings and conferences, including the final one where they had an opportunity to testify on a request for reinstatement of their cases. Appellants' actions at all of these meetings could have provided an additional basis upon which the Judge could make a finding of willful disobedience.

[1] Rule 37 of the Federal Rules of Civil Procedure authorizes the court to order dismissal of a party's claims for failure to obey discovery orders of the court. It is, however, the most extreme sanction provided for in the rule, and the Supreme Court has emphasized the necessity for cautious use of the rule.

> . . . Rule 37 should not be construed to authorize dismissal of [a] complaint because of petitioner's non-compliance with a pretrial [discovery] order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers, 357 U.S. 197, 212, 78 S.Ct. 1087, 1096, 2 L.Ed.2d 1255 (1958). This sanction should be exercised only in exceptional circumstances. *Thomas v. United States*, 5 Cir. 1976, 531 F.2d 746, 749.

The limitation on the use of this sanction, applies to protect those who, through no fault of their own, are unable to

comply with court orders. *Emerick v. Fenick Industries, Inc.*, 5 Cir. 1976, 539 F.2d 1379, 1381; *see also Thomas v. United States, supra; Dorsey v. Academy Moving and Storage*, 5 Cir. 1970, 423 F.2d 858, 861. It does *not* protect willful or bad faith noncompliance with court orders. The Supreme Court made this perfectly clear in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), a recent case involving facts very similar to the case at bar in which the Court reversed the Third Circuit ruling that the district court abused its discretion in dismissing an antitrust action because of repeated failure to timely answer written interrogatories. The Court quoted the district court's summary of the factual history of the discovery proceedings:

> "After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.*, June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37. If the sanction of dismissal is not warranted by the circumstances of this case,

> then the Court can envisage no set of facts whereby that sanction should ever be applied." 427 U.S. at 640-641, 96 S. Ct. at 2779.

Under like circumstances we echoed the sentiments of the Court, above, in *Emerick v. Fenick Industries, Inc., supra,* with the following statement:

> . . . when a [party] demonstrated flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion. 539 F.2d at 1381.

We have also said that while it is true that sanctions imposed in these situations should be "no more drastic than those actually required to protect the rights of other parties . . ., overleniency is to be avoided where it results in inadequate protection of discovery." *Diaz v. Southern Drilling Corporation, supra.*

[2] From a review of the full record in this case, it is clear that the trial court did not abuse its discretion in dismissing the appellants' cases. For a protracted period of time, and even up until ten days before trial, appellants refused to respond to discovery orders, seriously prejudicing appellees in the preparation of their case. In view of this pattern of callous disregard of court orders by appellants, including failure to transcribe depositions, failure to submit to court-ordered medical examinations, repeated failure to file timely and complete answers to interrogatories, failure to marshall exhibits, and failure to file witness lists, no lesser sanction than dismissal would have been adequate to protect the integrity of the court or the rights of the appellees.

AFFIRMED.

APPENDIX C

MINUTE ENTRY OF DISTRICT COURT

MINUTE ENTRY
SEAR, J.
AUGUST 22, 1977 Filed: August 24, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE LIQUID CARBONIC TRUCK DRIVERS CHEMICAL POISONING LITIGATION M.D.L. NO. 252

On August 17, 1977 at 10:00 a.m. a hearing was held in the captioned litigation at which the individual cases of Charles Strain, Lenny Strain, Rodney Strain, Carl Martin, and Dennis Morris were dismissed for failure to comply with my order of August 10, 1977 that full and good faith answers to interrogatories be filed by 5:00 p.m. on August 15, 1977. The cases of the remaining plaintiffs were continued to be rescheduled. A single violation of a discovery order would not ordinarily merit the extreme sanction of dismissal, but in this instance the past history of this case reveals a marked pattern of disobedience and lack of cooperation on the part of the nine plaintiffs represented by Mr. Louis Koerner (and in particular the five plaintiffs whose cases were dismissed) and by Mr. Koerner himself, albeit unintentionally. The cumulative effect of all of these incidents is a burden which no defendant or court should be required to bear. Because my decision was of such grave impact, I took time at the hearing to recapitulate in detail the most obvious instances of misconduct. In order to unequivocally preserve that history and my reasons for the record, I reiterate them here.

On August 16, 1976, a defendant United States Steel Corporation filed a motion to dismiss. The Koerner plaintiffs had sued "Pittsburgh Testing Laboratories, Inc., a division of United States Steel Corporation". The ground upon which United States Steel urged dismissal was that it has no division named "Pittsburgh Testing Laboratories, Inc." Koerner admitted the technical impropriety of his pleadings, but rather than solving the problem directly by amending them and making the motion moot, Koerner insisted on fighting the matter out. Koerner argued that on the basis of equity United States Steel should not be dismissed. At the hearing on the motion it was my opinion that since the entity sued was in fact non-existent, United States Steel had never been made a party at all. Koerner still did not amend his pleadings to add United States Steel for reasons unknown.

On September 1, 1977, another defendant, Transitron Mexicana moved to set aside an entry of default against it on the grounds that it had never been properly served. At the same time, it moved to be dismissed for lack of personal jurisdiction. At the hearing on this motion it was determined that Transitron Mexicana had not been timely served and the default was vacated. Koerner filed no opposition to the motion to dismiss apparently conceding also that Transitron Mexicana had little or no business contracts in Louisiana. Koerner informed the court that he had "mistakenly" sued Transitron Mexicana, while meaning to sue the United States division of the same corporation. Although Transitron Mexicana was dismissed, again, Koerner made no attempt at that time to bring suit against its American counterpart.

On November 30, 1977 the Judicial Panel on Multidistrict Litigation ordered the transfer to this district for consolidation of twenty-six cases from three judicial districts in two states. Koerner was well aware of this decision, having been present at the Panel's hearings, and should have understood the necessity of adding any other defendants immediately. However, he did not do so. The purpose of a multidistrict proceeding is to assure the uniform and orderly distribution of justice. Because these proceedings are typically large and cumbersome, it is absolutely necessary that all attorneys and parties cooperate fully with the court if the case is to be managed at all. Koerner's failure to add United States Steel and Transitron before the multidistrict transfer was the first evidence of problems to come.

On December 9, 1976 I issued a Practice and Procedure order which set forth the ground rules for the multidistrict litigation as it was to proceed in my court. This order set a conference for January 12, 1977. Koerner did not add United States Steel and Transitron before the conference, with the result that their representatives were not present when the discovery schedule was adopted and the trial date set.

At the January 12, 1977 conference it was brought to my attention that certain depositions had not been transcribed by the responsible parties, Koerner's plaintiffs, and were long overdue. I ordered that the depositions he transcribed before January 31, 1977. This was not done and has not been done to this day.

Subsequently Koerner attempted to file a third amended complaint adding United States Steel and Transitron without

leave of court, and by error in the clerk's office, was permitted to do so. Koerner would not voluntarily remove the amended complaint from the record, but had to be ordered by me to do so and to proceed properly. Finally, United States Steel and Transitron were properly joined. However, they had been stricken from the court's mailing list at the times of their dismissal and had not kept current with the case.

In early March both United States Steel and Transitron filed motions to dismiss on the grounds that they would be prejudiced by being joined so late in the litigation. Despite the fact that Koerner could offer no reasonable explanation for having waited five months since the dismissals of these two defendants to re-join them in the litigation, I did not dismiss the case against them. I did order that Koerner's plaintiffs bear the cost of United States Steel and Transitron "catching up" with the case. Despite the court order, Koerner was recalcitrant in this regard, and the court received several telephone calls and letters complaining of Koerner's failure to pay these "catch up" costs.

In early May both Process Engineering and Liquid Carbonic filed various motions to dismiss because of Koerner's plaintiffs' failure to comply with numerous discovery orders. These motions were referred to Magistrate Hughes who set them for hearing on June 15.

In the meantime, the court was informed that five of Koerner's plaintiffs (those dismissed here) had attempted to discharge Koerner and to find new counsel. I called a conference to deal with this new problem at which, in addition to all counsel, Koerner's plaintiffs were present. The plain-

tiffs were informed that they could retain new counsel if they wished to do so, however, any counsel brought into the case at this stage would have to assure the court that the trial date of August 29, 1977 could be met. After some investigation, it developed that plaintiffs could not find an attorney who was either willing to shculder the financial burden involved in the case or prepare the case in time for the August 29th trial. After further negotiations, the dissatisfied plaintiffs seemed to resolve their differences with Koerner and returned to his fold.

On June 9, 1977 I assisted in a settlement conference between all of the plaintiffs and a large block of the defendants referred to in this suit as "the chemical companies". It seemed at time a hopeless cause, but after hours of effort on the part of all concerned, myself included, it appeared that a settlement had been tentatively confected. (This settlement was finally concluded on August 10, 1977 by a consent decree in my courtroom.)

On June 15, 1977 Magistrate Hughes heard the motions of Process Engineering and Liquid Carbonic to dismiss. The primary grounds for the motions were (1) failure of Koerner's plaintiffs' to answer interrogatories, and (2) failure of two of Koerner's plaintiffs to submit to medical examinations ordered by the Court. Magistrate Hughes issued a minute entry on the same day stating that unless these two failures were cured by July 1, 1977 the cases were to be dismissed without further motion. The July 1st date came and went with no answers and no medical examination. Koerner apparently got an informal extension from Process Engineering's attorney until July 5th of which the court was not informed. Koerner did indeed file answers on July 5th; however, he

gave them to Process Engineering's attorney only on July 11th. On July 14, 1977 Magistrate Hughes, by way of follow-up to the earlier proceedings, submitted a report and recommendation to me. The report recommended first that the cases of the two plaintiffs who failed to submit to medical examinations be dismissed, and second that the cases of the rest of Koerner's plaintiffs also be dismissed for failure to file answers by July 1st, unless I found that the answers which were submitted late were complete and good faith answers.

Since it appeared that none of the remaining defendants were satisfied with the answers Koerner had supplied, Magistrate Hughes called a further conference on July 20th to discuss the problem. At five o'clock on that day, Magistrate Hughes and the attorneys removed the conference to my chambers. At the conclusion of the conference it was determined that Koerner would submit new answers and that Magistrate Hughes would carefully review them to ascertain whether the deficiencies in Koerner's July 5th answers had been corrected.

On August 2, 1977 my law clerk received a telephone call from Anthony Dingleman, an attorney who represented two plaintiffs. Dingleman reminded my law clerk that, according to a court order entered in January of this year, all exhibits in the cases were to be brought to my chambers on the following day for examination by opposing counsel. Dingleman then informed the law clerk that, although he was ready with his exhibits, he had just learned that Koerner had left town on an emergency matter, was unaware of the marshalling order, and had made no preparations for the following day. Dingleman filed a motion for extension of time on

behalf of Koerner, but the motion was denied since all defense counsel strenuously opposed it. Late on August 2nd at my instruction, my law clerk telephoned Koerner's office and spoke to Koerner's associate, Steven Bernstein. Bernstein was told that the exhibits were due in chambers on the morrow and to make preparations as best he could since there would be no extension of time.

On August 3rd defendants' counsel arrived at my chambers with all exhibits neatly ordered and labeled. Throughout the day Bernstein, who knew virtually nothing about the case, with the help of the rather flustered Dingleman, raced back and forth between Koerner's office and my chambers attempting to assemble some sort of presentation of Koerner's exhibits. Naturally, the results of their labors were confusing at best. Included among Koerner's plaintiffs exhibits was a large box full of perhaps a thousand sheets of miscellaneous unrelated papers marked as a single exhibit, and a set of personal photographs of Koerner totally unrelated to the case.

Koerner appeared briefly upon his return the following day, after being called and told to put his exhibits in order. However, Koerner did nothing to re-arrange his exhibits, but spent what little time he was in my chambers reviewing the exhibits of the defendants.

Meanwhile, Magistrate Hughes had reviewed Koerner's latest set of answers and found "no substantial improvement over the original answers". He submitted a second report on August 5th, recommending this time that the case be continued, commented that "I do not believe defendants can be compelled to go to trial on the information they have at hand

and may yet require with future discovery."

Determining that matters were quickly reaching a crisis stage, I called a hearing for August 10th to decide what action should be taken concerning Magistrate Hughes recommendation of July 14, 1977 that Koerner's plaintiffs' cases be dismissed. At the hearing the complaints of all sides were fully aired. My decision was that if Koerner did not submit satisfactory answers to the interrogatories by August 15, 1977 at 5:00 p.m., his cases would be dismissed. Koerner informed me that I had set him an impossible task. I reasoned however, that the interrogatories had been outstanding for many months, and that in view of the impending trial date, it was imperative that they be answered immediately.

The pre-trial conference was scheduled for 9:00 a.m. on August 15, 1977. All counsel except Koerner arrived at my chambers on time. At 9:10 my law clerk received a telephone call from Koerner to the effect that he was in the process of xeroxing the pre-trial order (five copies, at 78 pages each) and that he would be over when this was completed. Koerner was told to leave his xeroxing for later and to come immediately to my chambers with what he had. When Koerner arrived it turned out that the pre-trial order he brought with him had been substantially expanded from the version last seen and agreed to by defendants' counsel. Since no one except Koerner had seen the order in its new form, no one except Koerner was willing to sign the order, and further discussion about the contents of the order seemed fruitless. I instructed all counsel to appear in my courtroom on August 17, 1977 at 10:00 a.m. with a pre-trial order that could be signed, and indicated that we would also discuss at that time the possibilities that the case be

continued or dismissed. August 17th was also the date set in the marshalling order for ruling on all objections to exhibits.

At 5:15 on August 15, 1977 counsel for the defendants telephoned my office and left word with my law clerk that Koerner had not supplied revised answers by the 5:00 deadline. Apparently, the new answers were supplied thereafter on August 16th and 17th.

On the morning of August 17th shortly before 10:00 a.m. Koerner called my office to find out "when the conference was going to take place". He was informed that not only was the "conference" scheduled for 10:00 a.m. that morning, as had been clearly announced at the pre-trial conference, but that all objections to exhibits would also be ruled upon at that time, as scheduled by the Marshalling Order.

That same morning defendants' counsel filed an "ex parte motion to dismiss" on the ground that Koerner had blatantly failed to comply with my order of August 10th that he submit answers by August 15th at 5:00 p.m.

Rule 37 of the Federal rules of Civil Procedure provides dismissal as the most extreme sanction for failure to comply with a discovery order of the court. In Societe Internationale v. Rogers, 1958, 78 S.Ct. 1087, the Supreme Court explained that Rule 37

> should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pre-trial [discovery] order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Id. at 1096. On the other hand, the Supreme Court recently overturned a Court of Appeals decision which had reversed a district judge's dismissal of a plaintiff for failure to answer interrogatories pursuant to a court order. The opinion of the district judge was quoted as follows:

> After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied.

The Supreme Court found that under the circumstances the district judge had not abused his discretion and commented

on the reversal by the Court of Appeals as follows:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.
>
> But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statue or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."

Id. at 2780-81.

In this case, I cannot say that the failure of Koerner to comply with my order was due to any subjective bad faith on his part. But it certainly was "willful" in that it was done with full knowledge of the terms of my order and the consequences, and it was certainly his "fault", in that the failure to comply was entirely attributable to Koerner and his plaintiffs and was not caused by any outside hindrance. On the other hand, the deliberate refusal by the five plaintiffs dismissed hereto cooperate with Koerner in his efforts to comply with discovery is indeed bad faith, for which there is no excuse.

I have been extremely lenient with these plaintiffs. They have been under court order to answer these interrogatories since June 15, 1977. They have twice before been threatened with dismissal for failure to satisfactorily answer these same interrogatories. Each time before the threat has been withdrawn and plaintiffs have been given a reprieve. The order of August 10th would have commanded a third set of answers to the same questions had it been followed. Although I believe that a dismissal of all nine plaintiffs would be justified, I have limited the dismissal to the five named here since it is my understanding that these five contributed to the failure to answer interrogatories by refusing to speak to Koerner or answer his telephone calls over a period of several months while the interrogatories were outstanding. The remaining four plaintiffs have apparently offered Koerner some measure of cooperation on the interrogatories, and this minimal demonstration of good faith, makes me reluctant to dismiss their cases. However, if the interrogatories are not fully answered and the depositions transcribed by August 29th their cases will also be dismissed.

s/ M. L. S.
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

HEARING ON MOTION AND PROPOSED ORDER TO REINSTATE CASES AND TRIAL DATE -- MOTION DENIED

RODNEY J. STRAIN	CIVIL ACTION
vs.	No. 74-2363
KENNETH TURNER, et al.	Section "G"
CHARLES J. STRAIN	CIVIL ACTION
vs.	No. 74-2364
KENNETH TURNER, et al.	Section "G"
CARL MARTIN	CIVIL ACTION
vs.	No. 74-2368
KENNETH TURNER, et al.	Section "G"
DENNIS MORRIS	CIVIL ACTION
vs.	No. 74-2452
KENNETH TURNER, et al.	Section "G"
LENNY STRAIN	CIVIL ACTION
vs.	No. 74-3139
KENNETH TURNER, et al.	Section "G"

JUDGE SEAR PRESIDING

WED. AUG. 24, 1977

1. 10:00 AM

MOTION AND PROPOSED ORDER TO REINSTATE CASES AND TRIAL DATE BY PLTFS ALL PRESENT AND READY

COUNSEL PRESENT	FOR
EDWARD J. RICE, JR. ESQ.	10 EXEC. OFFICER FOR LIQUID
LLOYD W. HAYES, ESQ.	CARBONID CORP.
LOUIS R. KOERNER, JR., ESQ.	RODNEY STRAIN, ET AL.
STEPHEN M. BERNSTEIN,ESQ.	SAME
JERRY L. SAPORITI, ESQ.	PROCESS ENG. INC.
JOSEPH S. PALERMO, JR., ESQ.	SAME

PLTF WITNESS, CARL MARTIN, CALLED, SWORN, TESTIFIES.

MOTION DENIED BY THE COURT TO REINSTATE CASES AND FOR TRIAL DATE.

DATE OF ENTRY Aug. 24, 1977

MINUTE ENTRY OF AUGUST 29, 1977

MINUTE ENTRY
SEAR, J.
AUGUST 29, 1977

Filed: Aug. 29, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE LIQUID CARBONIC TRUCK DRIVERS CHEMICAL POINSONING LITIGATION — M.D.L. NO. 252

It has come to my attention that the name and citation of the recent Supreme Court case I referred to in my minute entry of August 22, 1977 was omitted. Accordingly, the following citatuion should be added to the bottom of page 6 of that minute entry: National Hockey League v. Metropolitan Hockey Club, Inc., 1976, 96 S.Ct. 2778, 2779-80.

s/ M.L.S.
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY Aug. 29, 1977